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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, *Appellant*, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, et al.	No. 84. (No. 317 of Term of 1903.)

(Appeal from Eighth Circuit.)

BRIEF FOR RAILWAY COMPANIES.

BURTON, HANSON and W. H. NORRIS,
Solicitors for Railway Companies.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH ST., CHICAGO.

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Minnesota statutes.

Limitations.

Action to determine adverse claims.

IN THE

Supreme Court of the United States.

Appeal from Eighth Circuit Minnesota.

OCTOBER TERM, A. D. 1904.

THE UNITED STATES, *Appellant*, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, THE SOUTHERN MINNESOTA RAILWAY COMPANY, MICHAEL DONOVAN, THOMAS S. THOMSON, O. C. ERICHSRUD, ANNA ERICHSRUD, ADDIE J. ERICHSRUD, MABELLE H. ANDERSON nee ERICHSRUD, JULIA P. REMINGTON, nee ERICHSRUD and LOUIS K. WOODWICK.	No. 84. (No. 317 of Term of 1903.)

I.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY HAS NO PROPER RELATION TO THIS SUIT; AND NO RELATION TO THE RELIEF SOUGHT. IT HAS NO RELATION TO THE SUIT, EXCEPT AS HAVING BEEN MISTAKENLY MADE DEFENDANT, AND AS HAVING AS MISTAKENLY JOINED IN ANSWER, AS IF PROPERLY IMPLEADED.

This suit is concerned, not with a land grant as such, but with a specific eighty-acre tract which once happened to be an item of a land grant.

The bill claims the *land itself*, not an accounting, *not any value* of the land.

When the initial bill was filed in March, 1893, neither railroad company had any interest in the land, it having been purchased, by warranty deed, about five years before, by O. C. Erichsrud, whose widow and children conveyed the same by warranty deed to Woodwick in 1899, nearly two years before the filing of the supplemental bill under which alone said widow and children and Woodwick became parties defendant.

With this eighty-acre tract, the Chicago, Milwaukee and St. Paul Railway Company never had, and except in and by Mr. Cary's manifest mistake in pleading equitable ownership through stock ownership, never claimed to have anything whatever to do; and this is demonstrated as well by the allegations of the Bill, as by the Stipulated Facts and by the Abstract of Title in evidence.

Item or division "15th" of the Bill (Record 4), alleges that the Southern Minnesota Railway Company contracted this land to Boysen January 5, 1885, and that the Southern Minnesota Railway Company, on the 20th day of March, 1888, executed a conveyance of this land to O. C. Erichsrud (later appearing to have been husband and father of the natural persons defendants other than Donovan and Woodwick); which conveyance was duly recorded in Fairibault County June 8, 1888, within a few weeks of five years before this ancient suit began.

It is true that item or division "16th" of the Bill (Record, 5) *charges* that the Chicago, Milwaukee and St. Paul Railway Company became and is the owner

of the grant made by the Act of Congress of July 5 (meaning 4), 1866, instead of the Southern Minnesota Railroad Company and the Southern Minnesota Railway Company, and became the *successor in interest* of those companies *as to said grant*, and stands in their place with regard to that grant and to the particular tract in question.

It fails to disclose how or why—and no proof in the case shows how or why.

On the contrary, the Stipulated Facts (IX, Record, 115) show that the Southern Minnesota Railway Company contracted to Boysen January 5, 1885, as alleged by the Bill; and the same item of the Stipulated Facts (Record, 115) and the abstract (Record, 176, top), show the tract in question to have been conveyed by the Southern Minnesota Railway Company March 20, 1888, and that conveyance to have been recorded June 8, 1888, as in that behalf alleged by the bill.

The deed appears at pp. 171-173 of the Record.

There is a total absence of proof, either to substantiate item or division "16th" of the Bill in any respect, or to establish or suggest any connection or relation between the tract in suit and the Chicago, Milwaukee and St. Paul Railway Company. *Nowhere in any of the proofs is that company mentioned.* And, except in its abstract of the railway companies' answer, every earlier brief for Complainant has been likewise silent.

The whole record of title is before the court, and as to the Chicago, Milwaukee and St. Paul Railway Company, the Bill and proofs *establish its misjoinder* as defendant; while the answer of the two railway com-

panies, denied by the replication so far as at variance with the bill, when compared with item or division "15th" of the bill *and with the proofs*, demonstrates the mere clerical error of our late general counsel, Mr. Cary (attributable probably to inaccurate information or to failing health), in supposing and naming the Chicago, Milwaukee and St. Paul Railway Company, instead of the Southern Minnesota Railway Company, as the contractor with Boysen and grantor to Erichsrud.

Until the retainer of Mr. Gilman as special counsel this case had lain fallow for years, and these mistakes were undiscovered until he detected them.

We contend no further on behalf of the Chicago, Milwaukee and St. Paul Railway Company, but in the remainder of this brief stand only for the Southern Minnesota Railway Company and its grantees, and for them only on account of the responsibility of the Southern Minnesota Railway Company under its warranty deed to Erichsrud. (Record, 115; 171-173.)

II.

PRELIMINARY AND EXPLANATORY PRACTICE.

The Government Counsel who took this appeal, by way of assignment of errors for its purposes, first (Record, 219-220) assigned seven supposed errors (distinguished by Roman numerals) of the affirming judgment or decree of the Circuit Court of Appeals; and then (Record, 220), as "VIII," further adopted "as assignments of errors herein each and all of the assignments made and filed in its (the U. S.) appeal from the court below to this court (the Court of Ap-

peals) as fully and to the same extent as if such assignments were repeated and restated; and he then added, "and the same are hereby referred to and made a part of the Assignments of Errors herein."

These earlier assignments appear on pages 207-9 of the Record, distinguished by the adjectives "First, Second," etc.

Had "VIII" been made "I," and had "I" been made "II," etc., the arrangement might have seemed more logical—but disregarding mere arrangement, we are confronted with all the supposed errors of the Circuit (or trial) Court, as not having been specifically annulled or corrected by the Court of Appeals, and by seven specific supposedly original errors of the Court of Appeals itself.

These latter seven (I to VII, inclusive) more or less involve questions within the scope of the errors earlier assigned to the decree of the Circuit (or trial) Court.

They raise no new question, suggest no new principle, material to the legal or equitable merits of this controversy.

They attack, not the judgment or decree of affirmance, but the reasons for affirmance formulated, without necessity, by the Judge who wrote the opinion of the Court of Appeals.

The concluding pages of every volume of the United State Reports set forth many "Decisions announced without opinions."

If the decree of the Circuit Court was right, it matters not if every reason assigned by Judge Lochren was without reason.

If the affirmance of his decree by the Court of Appeals was right because the original decree was itself right, it matters not if every reason for affirmance set forth in Judge Carland's opinion was erroneous or a misfit.

The appeal here is not from opinion or stated reasons for opinion, but from the judgment or decree of affirmance; and the present question is, was the affirmed decree itself right or wrong; and Atty. Gen. Purdy's brief concedes this. (Fot of his page 73.)

Judge Carland's last sentence (Record, 217) was, "The decree below was for the right party, and is affirmed."

We affirm his conclusion and adopt his reasoning, throughout, as part of our argument, and have nothing further to reply to Assignments of Error "I" to "VII," inclusive, except as any part of their significance may be involved in the earlier assignments adopted and bunched as "VIII," to which we hereinafter refer by their respective designations in ordinal adjectives, not in Roman numerals.

III.

AS AGAINST THE SOUTHERN MINNESOTA RAILWAY COMPANY AND THOSE WHO HAVE CLAIMED OR NOW CLAIM UNDER IT, THIS ACTION WAS PREMATURELY, IRREGULARLY AND UNLAWFULLY BROUGHT, AND SHOULD THEREFORE BE DISMISSED.

This action is avowedly brought (item or division "22nd" of the Bill, Record 7), "by and under the au-

"thority of and pursuant to the (said) Act of Con-"gress, approved March 3, 1887" (the full title of which is set forth in item or division "17" of Bill). (Record 5.)

Why so brought? No one could think an enabling act necessary to authorize a suit by the United States, upon general Equity principles, for the vindication of its own sovereign right of property, or for its own necessary reinstatement in a position of power to discharge an *obligatory* sovereign duty, if such there can be.

This statute did not multiply or enlarge the equities enforceable by the United States as a sovereign. Though Congress probably cannot create a new equity or power of equity enforceable retrospectively or retroactively as against previously acquired rights of a citizen; though it cannot rescind a vested right, or forbid or impair the enforcement, by private suit, of an equity otherwise controlling, it certainly can limit and regulate, can legislate away in whole or in part, *its own* pre-existing rights of prosecution, legal or equitable; it most certainly can abridge, limit or condition, by time, by defined circumstances, or by prescribed order of essential preliminaries, its own rights as a suitor, and the powers, otherwise discretionary, of its own officers, in respect to the institution of suits.

These things Congress did by the act of 1887; yet more by the five year limitation act of March 3, 1891 (26 Stat., 1093); and, with yet more consideration for the purchaser in good faith, by the act of March 2, 1896 (29 Stat., 42, quoted in 165 U. S., pp. 468-9), which in its Secs. 1 and 2, explicitly *forbids* vacation or an-

nulment of any Patent to lands held by a *bona fide* purchaser.

And in *United States* v. *Winona, &c., R. R.*, 165 U. S., at pp. 476, 477, the court, referring to the act of 1896 as affording *more* protection than mere limitation of time, and to its passage *after* the commencement of the suit then in hand, pronounced it "none the less an act "to be considered," *because*, "there can be no question "of the power of Congress to terminate, by appropri- "ate legislation, any suit brought to assert simply the "rights of the *government*. * * * And Congress "could at any time prior to the final decree in this (the "Supreme) Court, direct the withdrawal of such suit."

The act of 1896 then *governs* a suit brought under the act of 1887, by extending further protection, further immunity to the purchaser in good faith.

And upon the same page (476 of 165 U. S.), though the act of 1887 in terms referred to lands erroneously *certified* or *patented*, while the act of 1896 in its first section (as quoted by the court at foot of page 476) mentioned only *patents*, the Supreme Court pronounced "the opinion that Congress intended, by the "sentence * * * quoted from the act of 1896, to "confirm the title, which *in this case* passed by certifi- "cation to the state."

Obviously, any suit of the sovereign for the benefit of a citizen must be instituted and prosecuted at the sole discretion of the sovereign. No citizen can compel the sovereign to prosecute. The United States may, therefore, in certain cases and in the absence of prohibitory legislation, prosecute a suit of private in-

terest, or may by legislation directed to the restraint of its prosecuting officers, *retire* from the maintenance of private rights, leaving citizens possessed of such rights to pursue their private remedies in any appropriate forum. Aside from the matter of expense, this course not only need not be of injury to the citizen thus left to himself, but may even be of benefit to him, as mentioned in the Ard cases, where (p. 540) it appears that *before* sustaining Ard's titles as against grantees of the railroad companies, the Supreme Court had, in other suits brought by the United States, ruled, that the *United States* had "no cause of action against "the railway company or its grantees to disturb the "legal title thus conveyed."

We insist that this action—any action under the act of 1887—is a statutory action, a remedy to be adopted or resorted to, in any particular instance, only under the preliminary conditions prescribed by that act; that the act of 1887, coupled with the act of 1891, besides establishing a period of limitation and imposing circumstantial restrictions upon relief grantable in suits regularly begun, further circumscribed the equity rights and powers naturally original and inherent in the sovereign, by prescribing *conditions precedent* to such suit, and the sequence of such conditions; by establishing an ordered practice to be thenceforth essentially preliminary to any such suit; that the system thus created was by the rule of "*expressio unius,*" etc., made an *exclusive* system; and that no suit is maintainable under authority of that act until after due observance of such practice, due compliance with such precedent conditions.

What does the act of 1887 thus require? In section 2 it is provided that if, in course of the adjustments it shall appear that any land has been erroneously certified or patented for the use or benefit of any company claiming under a grant in aid of railroad construction, it shall be the duty of the secretary *to thereupon demand from* SUCH *company a relinquishment or reconveyance*, etc.; and that *if* SUCH *company* shall neglect or fail to so reconvey * * * *within ninety days after the aforesaid demand*, it shall *thereupon* be the duty of the Attorney General to commence and prosecute * * * the necessary proceedings to cancel, etc.

The first prescribed duty of the Secretary after discovery of erroneous patent or certification, is to demand relinquishment or reconveyance by *the* company for whose use or benefit the land was patented or certified.

His second duty is to allow the demandee ninety days for compliance—doubtless in order to give that company time, not only for investigation, but, if it has meanwhile sold, to endeavor to obtain relinquishment or reconveyance from its own grantee.

His third duty, after such ninety days, is to move the Attorney General to bring suit.

What performance of these duties does the Bill allege? Only that, after citing the *Chicago, Milwaukee & St. Paul Railway Company* (Bill, "17th," Record, 5), *no other company*, and after the responsive appearance of that company (Bill, "18th," Record, 6), and the adverse conclusion of the Secretary, he, the Secre-

tary, "caused a proper demand in writing to be made "upon *said* company for the reconveyance," etc., within ninety days thereafter; that such demand was made on April 9, 1889, "but that *said* company refused "to comply therewith, and has ever since," etc. (Bill, "19th," Record, 16.)

What do the proofs show?

The only proof of demand is in Government Exhibit "D" (Record, 127), referred to by Paragraph XII of the Stipulated Facts (Record, 116), in the statement by the commissioner to the secretary that the *commissioner's office, not the secretary*, had by letter, dated April 9, 1889, and addressed to H. G. Haugan, Land Commissioner of the *Chicago, Milwaukee & St. Paul Railway Company*, made formal demand for the reconveyance of title to the land described.

The specific language of the letter of demand (again mentioned as item 6, on page 127 of the Record), is not further made to appear, but is not here material.

Such semblance of proof as we thus have supports the allegation of the bill that the only demand attempted was made solely upon the *Chicago, Milwaukee and St. Paul Railway Company*, the imagined "successor in interest of the Southern Minnesota Railroad Company and the Southern Minnesota Railway Company."

Suppose the demand made as alleged by the Bill, as stated by the commissioner's letter, Government Exhibit "D"—WHAT OF IT?

It was not made upon the Southern Minnesota Rail*road* Company, the grantee of the state, the builder of

the road, the corporation for whose use or benefit this tract of land was certified.

It was not made upon the Southern Minnesota Railway Company, the only other railway company which ever had or claimed title to, or interest in, this tract of land.

If made, it was made only upon a railway company which *never had or claimed title, or appearance of title;* upon a company upon which no duty of reconveyance *could be* imposed; and this, *more than a year after* the Southern Minnesota Railway Company, the apparent owner of record, had conveyed to Erichsrud by a deed *placed upon public record ten months before the date of such supposed demand;* and, as already noted, the making and record of this deed is alleged BY THE BILL ITSELF.

A demand upon the Chicago, Milwaukee and St. Paul Railway Company was no more efficacious, no more a compliance with the act of 1887, had no more tendency to accomplish the purpose of Congress in requiring a demand, than would have been a demand made upon the Kamschatka Fur Company, or any other stranger to the land demanded.

If the act is possibly construable as, under the facts shown, authorizing a demand upon the Southern Minnesota Railway Company *as once claimant of title* and as grantor of record to Erichsrud, *no demand upon that company is pretended.*

No demand having been made upon any railway company or other person who had ever sustained any title relation to this land, the ninety days allowed by

the act between demand and suit *has never begun to run;* and without allowance of its intended opportunity to make amends by relinquishment or reconveyance, the secretary had no right *under this act* to order, or the Attorney General to institute, this suit.

IV.

WITHDRAWAL.

A leading question of the case concerns the efficacy of the withdrawal alleged by the Bill to preclude any entry of the tract in suit by Donovan.

This involves the "First" error complained of to the Court of Appeals.

It was a grievance of Appellant that "there is no "claim in the pleadings or in the evidence that the "withdrawal stood at all in the way of acquiring title "to the land under the Homestead or pre-emption "laws."

The Bill itself furnishing in an amendment (Record, 10), the fact, date and extent of the withdrawal, *no evidence thereof was needed,* and the answers had no need to include brief or argument upon a fact tendered by Complainant and not denied by defendants.

Counsel contended below that this allegation was *not intended* to extend the withdrawal to anything more than the granted or place lands, and was *not intended* to convey the idea of a withdrawal of indemnity land.

What Special Assistant Attorney Evans thus "intended" in 1894 must now be inferred from the allega-

tion itself, and from its relation to the subject-matter and object of the Bill.

The BILL RELATES SOLELY TO A SINGLE PARCEL OF INDEMNITY LAND.

(2) Counsel next contended that the withdrawal was unauthorized and void, because made *before* the designation of the route.

The two Land Department decisions (considered *infra*), which have been heretofore cited to this point, fail to support it, and are inapplicable to the terms of our granting act.

In *Atlantic & Pacific R. R. Co.*, 6 L. D., 84 (August, 1887), the granting act omitted to provide affirmatively for any withdrawal of indemnity land, and Secretary Lamar's conviction was strong that that act *prohibited* the withdrawal of any land outside of Place Limits. Such withdrawal having however been made, its revocation was sought.

Secretary Lamar held that the withdrawal having been made *only* under the general discretionary authority of the Secretary, was revocable by the same authority, and that the railroad having failed to keep its contract in commencing and completing its road, should not be heard to object.

That case involved no question of the efficacy of the withdrawal *before* revocation.

In *Northern Pacific R. R. Co.* v. *Davis*, 19 L. D., 87 (July, 1894), which concerned Indemnity land, the granting act provided for withdrawal on the filing of a map of general route; but in so doing not only directly

limited withdrawal to Place land, but by implication *forbade* withdrawal of Indemnity land.

Neither of these cases turned upon the date of withdrawal or upon the relation of that date to the date of Definite Location. The deciding reason of each was that the withdrawal under consideration was of land *any withdrawal of which Congress had forbidden.*

On the other hand, as Secretary Lamar mentioned in the Military Reservation case in 6 L. D., at page 18:

"It is true that the Executive, for the purpose of "carrying out the will of Congress as expressed in "legislation, *may* put lands in reservation *without spe-"cial authority*, and equally true that lands so re-"served, and for such purpose, are not subject to dis-"posal under the general laws, *although the reserva-"tion was not contemplated by law.*"

And this view is well supported by *Wolsey* v. *Chapman*, 101 U. S., from pages 768-9 of which the Secretary quotes as follows:

"The proper executive department of the govern-"ment had determined that, because of doubts about "the extent and operation of that act (granting lands "to Iowa to aid in the improvement of the Des Moines "River, 9 Stat., 77), nothing should be done to impair "the rights of the State above Racoon Fork until the "differences were settled, either by Congress or judi-"cial decision. For that purpose an authoritative "order was issued, directing the local land officers to "withhold all the disputed lands from sale. *This with-"drew the lands from private entry*, and, as we held in "*Riley* v. *Wells*, was sufficient to defeat a settlement "for the purpose of preemption *while the order was in*

"*force*, notwithstanding it was afterwards found that "the law, by reason of which this action was taken, "*did not contemplate such a withdrawal.*"

Wood v. *Beach*, 156 U. S., 548, quotes the same passage, adding, "This has been and is the settled rule of "the courts and the Land Department. * * * The "fact that the withdrawals were made by order of the "Interior Department, and not by proclamation of the "President, is immaterial."

The reasons why such act of the Secretary is in law the act of the President are fully set out in *Wolsey* v. *Chapman*, at page 770, and adopted in *Wood* v. *Beach*, at page 550.

Upon page 18 of 6 L. D., reference is also made by the Secretary to the opinion of the Attorney General of July 16, 1878 (6 Op., 80), where it was held, "that "a withdrawal made by the Secretary of the Interior "for the benefit of the Southern Pacific Railroad Com- "pany upon a line *which at the time it had no au- "thority to adopt* put the lands in reservation so that "*no legal rights therein could be acquired under the "general land laws.*"

It thus abundantly appears that the President, or the Secretary as his organ, may at discretion and without special statutory direction, withdraw from market lands the sale or other loss of which would impoverish or impair, perhaps defeat, a grant or reservation for a public purpose or for an enterprise of public importance; and that such withdrawal *while unrevoked* is effectual even when based upon mistake of law or of fact; and we find no instance in which a withdrawal has been held *void*, except where the particular grant-

ing act expressly or impliedly *forbade* general withdrawal or withdrawal beyond defined limits.

The withdrawal of the Southern Minnesota Railroad grant by the Secretary, at his discretion, in advance of the definite location, was, under the foregoing authorities, *neither premature nor ineffectual.*

If by reason of our grant and to protect and subserve its purposes, it was *within the power* of the Secretary to withdraw, independently of direction by the act itself, the provision of the act making it his "duty" to withdraw *upon the filing* of route maps, was not an enabling provision, not a grant of power, but, in line with the right reason for every proper withdrawal, was a command not to *defer* the protection of a withdrawal *longer* than the filing of such maps. If so, instead of a diminution of protection to the grant, it was an added emphasis upon the importance of *early* protection.

In our case the withdrawal was ordered August 23, 1866, and received at the District Land Office September 10, 1866. (Gov't Exhibit B; Record 118.)

Like the Congressional grant itself, the withdrawal became *definite as to parcels* on February 25, 1867, when the Definite Location became effective. (Stipulated Fact III, Record 113.)

That the withdrawal order was made and filed in the Local Land Office before the Definite Location, cuts no figure here, *because* Donovan's claims did not originate between August 23 or September 10, 1866, and February 25, 1867. Had the same order been made at the latter date, its effect upon an entry attempted

in June, 1868, would have been the same; and the order, one of discretion until February 25, 1867, became on that day one of strict statutory direction, effective until revoked—and of its revocation there is neither proof nor allegation.

According to the Bill (Record 10), the order withdrew, (not the lands "hereby granted," or Place lands alone, but) "the lands *embraced within the provisions* "of said act," and Section 5 of said act required the Secretary to "withdraw from market *the lands em-* "*braced within the provisions* of this act."

The "provisions of this act" necessarily embraced Indemnity lands, for the right of the beneficiary to them *had no other origin;* and the act, in providing for but one withdrawal, without distinction as between place lands and indemnity lands, itself justified withdrawal of both classes *at the same time*—and this construction, as we shall observe later, is in exact accordance with the long established understanding and practice of the Land Department in relation to all Minnesota railroad grants.

Appellant's third sub-point under this Assignment was that the withdrawal, if not void, did not withdraw the tract in suit, because it was then still subject to and excepted by the Barkley entry.

Was it so excepted?

Yielding to Secretary Noble credit for all sincerity in his conception of the uniformity of the rulings of the Land Department quoted by counsel from the Iverson case (14 L. D., 79-80), and yielding like credit to the opinions of the Commissioner and of the Secretary

as to the land here in suit (quoted in our Record), and admitting that some rulings of the Land Department had been made as stated by Secretary Noble, we must say that neither of those gentlemen then acted as a *lawmaker* or as a *final judge;* and

(1), that if any such ruling was required or justified by the Statute under which it was in the particular instance, promulgated, our granting act neither requires nor justifies any such exception. The sole exception of land from the operation of our act on account of the attachment of settlers' entries, is *solely of land in place limits, of land for which a substitute was to be sought in indemnity limits.*

The final proviso of Section 1 of the act is of land reserved *to* the United States itself for Distinctively National uses, and that reservation can mean neither more nor less than was meant by "reserved *by* the "United States for any purpose whatever"; which is contradistinguished in the earlier part of the Section, from sale and from attached settlers' rights; and Appellant's concession that upon cancellation of the Barkley entry this tract became selectable as an Indemnity tract, is an abundant concession that our distinction between the exceptions of this act is correct;

(2), that *unless clearly necessitated by statute,* no such ruling has any rational foundation. The exception of Place Lands on account of settlers' rights was designed to save rights of settlers who might be upon such lands in advance of any right of the beneficiary—settlers usually thereon before the passage of the granting act.

But no such reason can apply to the inclusion in a

withdrawal from general market of a possible indemnity tract already subject to a settler's entry. Such inclusion would hurt no such settler, but would, in fact, afford him additional protection, by insuring him against claim-jumpers, and from any competitive attempt of any buyer or other settler. A withdrawal in aid of a railroad, without prejudice to the earlier settler, necessarily subject to his rights, if any, of any given tract of land within Indemnity Limits, limits created by the granting act upon the presumption, always well founded, that lands within the place limits only will prove insufficient to fulfill the inducement tendered by the granting act, is no hardship and no injustice to any citizen who has as yet *attempted no settlement, invested no labor, no money, no hope*, in *the particular tract;* works upon the citizen *not yet a settler* no differently from a withdrawal or reservation of public land for any other of the numerous purposes for which withdrawals and reservations are made. And so long as a beneficiary proceeds with reasonable diligence and good faith in fulfillment of his contract with the Government, *he ought to be protected against depletion of the fund upon which the granting act has invited him to rely;*

(3), we insist that the Department holding relied upon by Appellant is inconsistent with the long established railroad land grant practice of the Department in related and more important particulars. For, it is published to the world under authority of the United States in the *Winona & St. Peter case*, 165 U. S., 463, 465, 473, and is thus and otherwise abundantly matter of judicial knowledge without formal proof (though

formally proved at pp. 186-7 of the Record), that until the *Dunmeyer decision*, 113 U. S., 629, March 2, 1885, a homestead entry abandoned before the right of the road attached was held not to except the land from the grant—that a pre-emption claim abandoned after attachment of railroad grant did not defeat the grant, but upon failure of the claim the land would inure to the grant as of the date when the grant became effective; that the rights under the grant attached to the lands in granted and indemnity limits *as of the same date;* that selection was not deemed necessary to attach the grant to any specific tract within indemnity limits; that the lands within the indemnity limits were *withdrawn at the same time* as those within the primary or granted limits; and that in accordance with these rules (among others stated therewith), the grants to and for *each and all of the land grant railroad companies in the State of Minnesota were before, at, and for a long time after the certification of the lands* (there) *in question, administered.*

At page 464 of 165 U. S., it appears that all but two of the parcels there in question were certified in 1872, 1873, 1874 and 1875, and those two in 1879.

The tract here in suit was certified March 25, 1871, after selection November 29, 1870; and

(4), whatever may have been the uniformity of the alleged ruling after 1868, Appellant's evidence in this case demonstrates that before the Commissioner's letter of February 14, 1889 (Record 119), the tract here in suit was not regarded by the Land Department as excepted from the withdrawal; for Register Bullis, with all his manifest anxiety (*shall we call it remorse-*

ful, or COLLUSIVE?) to make a case for Donovan, testifies (Record 49-50), that *when Donovan applied* to enter the two tracts "he was informed that *we were* "*instructed* not to allow any entries on odd numbered "sections within a certain distance of the railroad"—(evidently referring to indemnity limits)—was told (Record 50) "he could not enter that tract (in Section "35), because it *belonged* to the railroad company;" Donovan's testimony (Record 66, foot) is to the same effect.

Official refusal to allow entry of land in indemnity limits not yet selected by the railroad company could have proceeded upon no theory except that of *a withdrawal in force;* and the view and statement of Register Bullis that this tract was already "railroad land" could, under then existing facts, have had no foundation but *specific instructions* from Washington, founded upon the settled rules and practice of the Department already quoted from 165 U. S.; and from those rules it logically follows that if upon cancellation of Barkley's entry this tract of land inured to the grant without discrimination as between place lands and indemnity lands, it necessarily inured to the *body of lands withdrawn*, fell within the terms of the withdrawal order; this because it was "*embraced within* "*the provisions*" of the act, and because, as pleaded by the Bill, the order accurately followed the statute; because (in reverse order of the rules quoted) indemnity lands were withdrawn *at the same time* as place lands, and need not be selected; and because rights under the grant attached to granted and indemnity limits at the same date.

And *the instruction* to which Bullis referred, as a reason for disallowing entry of the 80 in question, was then, *in itself, a subsisting withdrawal of this tract* among others likewise located.

V.

DONOVAN'S ATTEMPTED ENTRY.

We insist that if, either under the established departmental construction of that generation or under proper interpretation of our granting act, this tract, upon cancellation of Barkley's entry, January 14, 1868, inured to the grant, and so fell within the operation of the general withdrawal, *it remained withdrawn* five months later when Donovan attempted entry, and until its certification ended *as to it* the office of a withdrawal; nay more, that if the instruction not to permit entries within indemnity limits, of which Bullis told Donovan as reason for not allowing entry of this 80, was not made before January 14, 1868, when the Barkley entry was cancelled, but was made then or thereafter *before* June 6, 1868, that was in itself a good withdrawal; and this latter supposition is probable because Bullis did not reveal this instruction to Donovan until the day when they destroyed the old, *half-finished bluffing application* and wrote up the new one in June, 1868.

Actual withdrawal whenever and however made, if unrevoked when Donovan attempted entry, justified disallowance of his attempt, if disallowed rather than waived, and nullifies all claims and contentions here asserted, whether on the part of the Appellant or on

behalf of Donovan, and would have been fatal to his entry had it been regularly permitted.

After withdrawal, "no title could be initiated or es-"tablished, because the Land Department had no right "to grant it." (End of opinion, per Miller, J.)

Bullard v. *Des Moines, etc.*, 122 U. S., 167.

"After such withdrawal no interest in the lands "granted can be acquired against the rights of the "company, except by special legislative declaration; "nor, indeed, in the absence of its announcement, after "the general route is fixed."

St. P. & P. v. *N. P.*, 139 U. S., 1, 18.

In *Wood* v. *Beach*, 156 U. S., 548, one of the granting acts involved (p. 551), enacted:

"That as soon as said company shall file with the "Secretary of the Interior maps of its line, designating "the route thereof, it shall be the duty of said Secre-"tary to withdraw from the market *the land granted* "by this act in such manner as may be best calculated "to effect the purposes of this act and subserve the "public interest."

This act passed twenty-two days after ours.

It *directed* withdrawal, *not* of all the lands *embraced*, etc., but of the lands *granted*, *i. e.*, as ordinarily understood, *place lands*.

The map of definite location was filed December 6, 1866. Separate orders of withdrawal as to two different companies were made in the following March and April, and respectively received at local land office in April and May, 1867.

C. B. Wood, husband of plaintiff in error, settled upon and attempted entry of a tract of *indemnity land* June 8, 1870. The railway company selected the tract August 8, 1872. Selection was "approved April 10, 1872," (doubtless 1873), and the state conveyed May 9, 1873.

The Supreme Court, speaking by Justice Brewer, first remarked (549, foot):

"If these withdrawals were valid, *no rights, legal or "equitable*, were acquired by his (Wood's) occupation "and settlement."

Referring to *Wolsey* v. *Chapman*, 101 U. S., 755, 768, and after mentioning the need of a withdrawal, as required, *not by statute*, but by circumstances, Justice Brewer (p. 550), quotes:

"For that purpose an authoritative order was is- "sued directing the local land officers to withhold all "the disputed lands *from sale. This withdrew the "lands from private entry*, and, as we held in *Riley* v. "*Wells, was sufficient to defeat* a settlement for the "purpose of pre-emption *while the order was in force*, "*notwithstanding* it was afterwards found that *the "law*, by reason of which this action was taken, *did not "contemplate* such a withdrawal."

We subjoin the last paragraph of this opinion, substituting Donovan's name for Wood's:

"Upon these admitted facts, it is clear that Mr. "Donovan acquired no equitable rights by his occupa- "tion and settlement. He went upon lands which were "not open to homestead or pre-emption entry, and can- "not make his unauthorized occupation the foundation "of an equitable title. He was not acting in ignorance

"but was fully informed both as to the fact and the "law. He deliberately took the chances of the railway "company's grant being satisfied out of lands within "the place limits, or by selections of lands within the "indemnity limits other than his, and trusted that in "such event this tract would be restored to the public "domain, and he gain some advantage by reason of "being already on the land. But the event he hoped "for never happened. The party for whose benefit "the withdrawal was made complied with all the condi- "tions of title and took the land."

Like reasons governed in *U. S.* v. *Holmes*, 105 Fed., 41, 45, 46.

Any withdrawal, then, made before June 6, 1868, and then unrevoked, precluded Donovan's attempted entry however completely he may then or afterwards have complied with all formal particulars of statutory requirement; and his attempt *initiated no right* in him. For the same reason his appropriation of Barkley's abandoned logs and his breaking up in the latter part of 1868, and before November, 1870, of a few acres additional to Barkley's earlier breaking, upon a tract of uninclosed land without a building and separated from his house 80 by a public road, invested him with no right, and therefore could not operate as notice of any right to the land; was but an average illustration of squatter practice. No inquiry of Donovan or of any one else before the railroad selection, could have ascertained a right in him *which had no existence as a right.*

Should we be reminded (as heretofore) that the answer of the railway companies admits, among other things, that the land was subject to homestead entry

by the first legal applicant after the cancellation of the Barkley entry, we would say, first, that because, as the law was then construed, practiced and suffered to appear, this land was then *actually withdrawn*, or, *if the withdrawal of this tract*, or of disengaged indemnity lands generally, was made *at or after the time* of the Barkley cancellation, by means of the Washington instructions of which Bullis told Donovan, Donovan was, in neither case, a *legal* applicant; and, second, that an erroneous admission by pleading *in matter of law*, CANNOT ALTER THE ACTUAL LAW, however a mistaken admission might bind the pleader as concerning a strict evidentiary fact.

VI.

DONOVAN'S ALLEGED FULFILMENT AND VESTED RIGHT.

The "Second" error attributed to both courts below, involves Appellant's combined contentions to the effect that Donovan was entitled to enter the 80 in suit, attempted to do so, was rejected, nevertheless paid for it, fulfilled all legal requirements as to occupation and use for five years and upwards, and offered to prove up; and that he thus acquired a perfect ironclad vested right.

As to what took place thirty-four or thirty-five years ago between Donovan and Bullis in the latter's office, we are at the mercy of so much of their collusive testimony as the court may believe.

What no one else saw or heard is uncontradictable except by probabilities, and *improbability is a strong opposing witness.*

Donovan is interested and wily. If their united testimony is true, and it was not fully and fairly understood between them that Donovan willingly waived the 80 in suit, Bullis is convicted by this record of disobedience to Section 2295 U. S. R. S., which was and is:

"The Register of the land office shall note all appli-
"cations under the provisions of this chapter on the
"tract-books and plats of his office, and keep a register
"of all such entries, and make return thereof to the
"General Land Office, together with the proof
"upon which they have been founded,"

in omitting to "note" Donovan's application for the 80 in question, in omitting to keep a register of it as an entry, and in omitting to make return thereof to the General Land Office; and he is likewise convicted of embezzling whatever Donovan paid to him for this 80; and is likewise convicted of thus doubly violating his official oath.

And by the testimony of such worthies, the United States of America, as Protector, as a Parent, even here persists in effort to strip defendant Woodwick of his $2,000 property, and turn him back upon the warranty of four women, and the warranty, to the extent of $480 and interest, of the Southern Minnesota Railway Company. Of course Donovan's trespasses upon the land *before* the Barkley cancellation can count for nothing.

We do not believe that Donovan ever paid or offered a penny on account of this eighty.

Donovan says (Record 65) that he paid Bullis $15 *after the trial* was over, *i. e.*, in August, 1867; he does not say for what. He does not, by any official or other

receipt corroborate himself or override Bullis' statement, which will be shortly mentioned. If Donovan so "paid" in 1867, he paid to an officer who had then *no official right to receive* on account of land still subject to Barkley's entry, and it was then no payment, but a *personal* deposit.

In answer to the vigorous and enticing leading question (Record 49, above middle), "As soon as Barkley's "entry was cancelled, *and you made his* (Donovan's) "*entry on the books* of the application for the land, "did he pay *for the land* and the fees incident at that "time," Bullis replies, "I THINK he did." *Yet* Bullis had not made, had never made, *any entry on the books* of Donovan's application for our 80. (Record 192.)

Bullis says nothing as to the *amount* then supposedly paid him, and says no more than this as to the *date* of such payment. His testimony locates the supposed payment in June, 1868, and thus contradicts any statement that *any payment "for the land* and the fees *had "been made before* June 6, 1868," for we have no evidence that Donovan was at the land office between the trial in August, 1867, and his visit of June 5 or 6, 1868. (Record, 66, 78, 79.)

According to Donovan, he at some time paid $15 *besides* the expenses, $9—for what?—*for what* had Bullis an *official right to exact* $15, even in June, 1868?

The Homestead Act exacts no price for land entered under its provisions, unless the $5 and $10 mentioned in Section 2291 are prices, and not "*fees*"; and besides $5 in respect to an 80 or $10 in respect to more than one 80, we discover nothing payable by a homestead

entryman, at the time of entry, except (under the third subdivision of section 2238), a commission of 1 per cent. on the *cash price fixed by law*, of the land applied for—which commission, as to land outside of place limits, would be $1 per 80.

For homestead entry of both eighties, Bullis could thus ask only $10 plus $2 commission. Why then should $3 more be added, and if added, what did it pay for—if $10 was "fees," was the other $3 "the *government price* for said lands"—for 160 acres? Or was it neither price of land nor fees, but a bribe to Bullis, to bear fruit in the future?

We fully believe that Donovan never paid Bullis more than $15 in all; and that this $15 was made up of the $9 for expenses paid in 1867, and of $5 plus $1 commission paid on or about June 6, 1868, solely for the entry of the 80 in Section 26; just what Bullis, then and for that purpose, had a right and duty to receive.

It is for the court to determine whether the slight uses and abuses of the land in suit here appearing to have been made by Donovan in a sparsely settled and unfenced prairie region, between June 6, 1868, and May, 1875, could, under all circumstances in proof, have been sufficient to entitle Donovan to a Patent had his attempted entry been originally allowed.

He made no improvement of consequence. In an 80-acre tract, of the 65 acres under cultivation in 1901 (Record, 166), Donovan claims to have broken a few acres in 1868, about 12 acres more in 1871—between 18 and 20 acres in all (Record 90-91)— the last of it in 1871 (Record 166). Except cultivation of these ploughings Donovan's uses of the land consisted only

of the browsing of his cattle in the open country, and his partial care and use of a ditch beginning during Thompson's occupation, for drainage of his home 80 and of the land in question, a ditch unquestionably dug or maintained only by Thompson's permission, if not partly for his benefit and so inducing his permission.

Without aid of such testimony as that of Silliman (Record 149-150) as to the local practice of settlers in breaking, farming and otherwise using adjoining vacant lands not their own, it is said in *Tarpey* v. *Madsen*, 178 U. S., at p. 221:

"It is a matter of common knowledge that many go "onto the public domain, build cabins and establish "themselves, temporarily at least, as occupants, but "having in view simply prospecting for minerals, "hunting, trapping, etc., and with no thought of ac- "quiring title to land."

With less elegance, the court might to the same effect have said: "We understand the methods of squat- "ters;" and it is a very practical question whether until about May, 1875, Donovan *thought himself*, as to this land, anything but a squatter.

As to actual possession after June 6, 1868, and until Thompson came on in 1885, we can admit that no one but Donovan was in any possession or cultivation of said tract; that in 1885, Thompson *ordered* him off, and that thereafter until the decision of Donovan's suit against Thompson early in 1888, Donovan alone made any actual use of the uncultivated portions of the tract; portions for the wild grass upon which Thompson seemed not for the time to care—so that

Donovan's cattle *at large* browsed over them as over *any other* convenient *uninclosed* land not in actual use.

As an appeal to judicial compassion, Appellant's previous briefs have industriously asserted that Thompson *"forcibly"* expelled Donovan.

The Record contains no extenuation for such assertion.

Coming to Appellant's second contention heretofore under the "Second" Assignment, to the effect that *Donovan's application to enter secured to him the same rights as if his application had been allowed*, we cannot, with reference to the land in question, or to the facts in proof, concur in the proposition itself, or in the applicability of past citations for its support, or in counsel's deductions from them; and on the contrary, those citations are in flat contradiction of cases of high standing to which we will refer.

Shepley v. *Cowan*, 91 U. S., 330, 338, is in our favor. In June, 1868, the reservation of *our* indemnity belt by withdrawal order *had not "then ceased,"* but was in full force, and Donovan *was informed* that the 80 in question was railroad land, and *therefore* not subject to entry.

Ard v. *Brandon*, and *Ard* v. *Pratt*, 156 U. S., 537, do not apply for two obvious reasons:

First, because those suits were between private individuals. In suits involving these same lands (p. 540) it had been held in 118 U. S., 682, and 141 U. S., 358, that the United States had *no cause of action* against the railway company *or its grantees* to disturb the legal titles conveyed to one company by pat-

ent, to the other by certification; although Justice Harlan had said in the latter case (p. 379):

"If the facts are as thus alleged, it is clear that the "Missouri-Kansas Company holds patents to land "both within the place and indemnity limits of the "Leavenworth road which equitably belong to *bona* "*fide* settlers who acquired rights under the homestead "and pre-emption laws, which were not lost by reason "of the Land Department having by mistake or an "erroneous interpretation of the statutes in question "caused patents to be issued to the company."

The Ard cases are inapplicable, secondly, because, when Ard sought to file his entry July 14, 1866, he had already settled upon the land; the land was within indemnity limits, but *no order of withdrawal* was made until March 19, 1867. Because, when he sought to enter, the land *had not been withdrawn*, he had a clear right of entry, and the only reason given for *his* rejection was a *false* one, viz.: that the land was in place limits, although it was not.

Weeks v. *Bridgeman*, 159 U. S., 541, applies to no such situation as Donovan's.

Brott, in possession, with constructed mail stations used in his federal employment as a mail carrier, applied to pre-empt *what later became* place land; he did so over four months before the definite location. His right, begun by settlement when the land was absolutely free and public, retained by use, was in full effect, opposed by no rival claim or right, when he applied to enter. No withdrawal stood in his way. No definite location had yet been made. Of course his right to enter was clear and the whole reason for this

decision is the holding of the court that Brott never forfeited his right of acquisition though he consummated his pre-emption by adventitious aid of a special act of Congress, which was in effect, simply a *Command of Congress* to allow his original application.

Here Donovan did not attempt entry before definite location, but did so only *after withdrawal,* and when, *because* of the withdrawal, he had *no right* of entry.

Tarpey v. *Madsen*, 178 U. S., 215, will be hereafter sufficiently distinguished.

From *N. P. R.* v. *Amacker*, 175 U. S., 564, and from page 567, heretofore specially cited by Appellant in proof of the so touching tenderness of the law for one who in *good faith* goes upon the *public* lands with a view of *making a home* thereon, may we quote the lower four lines:

"Yet this would never justify an ignoring of the "clear rights of the company; for the purpose of Con- "gress in the grant must be recognized and made "effective in every case to which the grant applies."

Donovan did not go upon our 80 "*in good faith,*" but, like Wood in *Wood* v. *Beach*, like Madsen in *Tarpey* v. *Madsen, as an experimenter in bluffing;* actually, as we insist, unaccompanied by any fair semblance of compliance with the law, *under pretence of advice* from a petty land officer, who, as we are asked to believe, foresaw in 1868, conclusions never dreamed of by any of the long procession of his superiors in the Interior Department, and reached by the Supreme Court only in 1885.

But if any citation of Appellant can possibly apply

to our facts, how shall it be reconciled with the *Dunmeyer* case, the *Whitney* case, even with the *Tarpey* case?

In the *Dunmeyer* case, the tract in question was place land, upon which one Miller had filed a homestead claim before definite location of the railroad, which he afterwards abandoned.

One question there was, *what sort, form or proceeding,* by way of entry, will *so* bind and hold land *as to except it from a railroad grant?* On page 644, Justice Miller, uttering a unanimous opinion, said that Miller's claim was made and *filed* in the land office, and *there recognized* before the line of the road was located; that Miller's claim was an existing one *of public record* in favor of Miller *when* the railroad map was filed; that this homestead claim had "attached"; that "attached" did not mean mere settlement, residence or cultivation of the land, but it meant a proper proceeding in the proper land office. And it follows from what he had just before said, that by "proper proceeding" he meant a proceeding *entered of record* as required by Sec. 2295.

In the *Whitney* case, 132 U. S., at p. 364, commenting upon an irregular entry actually allowed and *recorded,* the court said:

"So long as it remains a *subsisting entry of record,* "whose legality has been passed upon by the land au- "thorities, and their action remains unreversed, it is "*such* an appropriation of the tract as segregates it "from the public domain, and *therefore* precludes it "from subsequent grants."

In the *Tarpey* case, 178 U. S., 215, one Olney had on

May 29, 1869, attempted pre-emption, alleging settlement on April 23, 1869, which was later than October 20, 1868, the date of the definite location of the railroad. Nothing more was ever heard of Olney.

In June, 1896, Madsen filed a homestead entry, alleging his own settlement and occupation since 1888.

Madsen attempted to *avoid* the railroad title by oral proof that Olney *actually began* his settlement *before* the definite location of October 20, 1868. Madsen was not allowed to go behind the date of Olney's settlement as *Olney had caused it to be put upon record.* And concerning the efficacy of Olney's settlement to defeat the railroad title, the court (at p. 219), by Justice Brewer, said:

"That there was *nothing of record* affecting the "validity of that title, is conceded. No one, by an *in-*"*vestigation of any public record, could* have ascer-"tained *at that time* (October 20, 1868) that there was "any doubt in respect thereto."

This *Tarpey* case has been cited for Appellant to extol and exemplify the melting tenderness for settlers, which Olney, the original entryman, did not merit or ask, which the court refused to the *interloper,* although he had *successfully operated as a squatter* for eight years.

In the *Tarpey* decision let us observe its commentary, at page 223. After there mentioning that the *Van Wyck* and *Dunmeyer* cases settled the date of filing map of definite location as the inception of railroad title, it was said:

"*This eliminated all oral testimony,* and established

"a date at which *by record*, the title of the railroad "company could be considered as definitely ascer- "tained. In the latter of the two cases (*Dunmeyer*), "the same elimination of *oral* testimony, the same ref- "erence to the *record* as determining all opposing "rights of the individual entryman, was also de- "clared."

Further quotation is there made from page 640 of the *Dunmeyer* case, with reference to the ascertainment, at or after the filing of the map of the lands excepted from grant; thus: "For *by examining the plats* "of this land in the *office of the register and receiver*, "*or in the general land office*, it could readily have "been seen if any of the odd sections had been "sold * * * or a homestead or pre-emption claim "had 'attached' to any of them."

And in the *Winona & St. Peter case*, 165 U. S., 463, Justice Brewer, in stating the case (p. 464), recites that no former entryman "had ever made any claim "to the lands, so far as shown *by the records* of the "land department."

Can the records of the Land Department and their purpose be further magnified, their value be more emphatically illustrated; license, *if not command* to rely upon *them* be more pronounced?

If there *ought to have been* a record of Donovan's mythical application to enter our 80, the want of such record to serve as a warning to the railroad company and to its grantees, is *wholly the fault of the United States and its officers.*

Can it be that while R. R. beneficiaries of Land

grants are to be bound and limited by Government Records, they are to be *denied all benefit* of the same Records?—that such Records are good *only to protect claimants adverse to such beneficiaries?*

This court is asked to override the righteous intuitions of the Courts below and to adjudge, to the injury of Woodwick, and, back of him, of the Erichsrud family, and, back of them, of the Southern Minnesota Railway Company, upon the feeble guessing, under strong and skilled leadership, of the evidently failing, if not broken down man and self convicting criminal *whose alleged neglect of duty* has given rise to this controversy, and upon the testimony, interested, artful, in some respects improbable, and in all respects which refer to the unseen and unheard doings in Bullis' office, *uncontradictable*, of the man for whose sake the United States, without gain to itself, is willing and striving to do a great wrong to its more meritorious citizens, in the name of "Equity."

Therefore, denying that Donovan ever had a right of entry, or that before the certification, or in connection with proving up on his house 80 in 1875, or at any time before the act of 1887, or ever as against the efficacy of our selection and certification, Donovan so complied with the law as to become entitled to a certificate or patent, we deny the pertinency of Appellant's contention that he acquired a vested right in the premises, and deny the pertinency of any authorities thereunder heretofore cited to the *Appellant's case as made.*

On the contrary, because, as we contend, he never paid, in respect to the land in suit, the $5 required by

Section 2290; because he never, before proving up in 1875, did anything with or upon the land itself, which any other squatter would not have done; because it does not appear that his offer of proof as concerning our 80 would or ought to have been accepted as sufficient; and because, as we shall later contend, under all common criteria of human motive and purpose, Donovan thoroughly waived and abandoned his pretended entry, except when at long intervals, his covetousness casually reasserted sway, we insist that he never acquired, as against our state, or its grantee or assigns, any approach to a vested right; and that his plight falls outside the protection of the *Gonzales*, *Newkirk* and *Hawley* cases, and under the opinion of Brewer as Circuit Justice in *Norton* v. *Evans*, 82 Fed., 804, which was a case of attempted homestead entry *rejected*.

That opinion was supported by five Supreme Court decisions, refused to apply *Ard* v. *Brandon*, 156 U. S., and was followed by our Circuit Court of Appeals in *Wagstaff* v. *Collins*, 97 Fed., 3.

In *Norton* v. *Evans*, it was ruled that even an *allowed entry* would have *created no vested right*, and did not interfere with the power of Congress by *subsequent legislation* to dispose of the land.

VII.

SELECTION AND CERTIFICATION.

We come now to consider the validity of the Selection and Certification; involving Appellant's assign-

ment of error to both courts below; under which it is asserted that the certification was *void*, and that for *that* reason there *can be*, under it, *no bona fide* purchaser.

We contend that the cancellation of the Barkley entry in January, 1868, immediately made this 80 selectable by the railroad company, made it (if not such before) a tract of "the *lands embraced within the provisions* of this act", and that all such lands had not only *become withdrawable* in accordance with the command of the act, but that they had, before June 6, 1868, been withdrawn in form and in fact, either by the original order of 1866, or by the instructions of which Bullis testified.

And this conclusion, co-incident with the habitual opinion and habitual practice of the Land Department, results from the terms and requirements of the granting act itself, and is in harmony with the views of this Court in the *Winona & St. Peter case*, 67 Fed., syllabi 11-13, p. 949, and pp. 967-8.

Referring to our earlier citations of the *Dunmeyer, Whitney and Tarpey cases*, as to the utility and efficiency of the public land records, the right to rely upon them, no less than the duty to consult them, and to the proof that *no record* of Donovan's alleged attempt was ever, before the certification, any where made; we submit that the selection was justified and should be protected by the principle of *Ryan* v. *Ry Co.*, 99 U. S., 382, 388.

There indemnity land freed and made selectable by the cancellation *of record* of a former claim, was held to be effectually selected, *because when selected* it was

free from any adverse claim *of record*. And that our 80 was when selected, thus free, appears in the Record at top of p. 192.

The *Ryan case* was, among others, applied by our Circuit Court of Appeals in the *Winona & St. Peter case*, in 67 Fed., at p. 968.

Let us remember, in the light of the beginning-to-be conscientious remedial legislation of 1887 and 1896 already referred to, that in an EQUITY ACTION in which the United States is suitor, we are considering, not what in 1885 the Dunmeyer case *discovered* the law to be, but what from a date long prior to 1866 and until the Dunmeyer decision, the United States, its Land Department, its Courts, and its Congress supposed, or made the law to *seem to be*, led the world *to believe it to be*. As matter of fact, *was not such*, through all that period, actually "*the law of the land*," amply justifying, even enjoining, reliance of the people upon it *as law*.

In 1878, in *United States* v. *Burlington, &c., R. R. Co.*, 98 U. S., at p. 341, the unanimous court, under similar considerations, said:

"Such has been the *uniform* construction given to "the acts by *all* departments of the government. Pat- "ents have been issued, bonds given, mortgages exe- "cuted, and legislation had upon this construction. "*This uniform action is as potential, and as conclusive* "*of the soundness of the construction, as if it had been* "*declared by judicial decision.* It cannot at this day "be called in question."

Can it be reasonably said, that the railroad company in selecting this tract November 29, 1870, or the Sec-

retary in certifying it in March, 1871, was not justified in relying upon, in acting in accordance with, rules so long and so universally applied? The land had become clear of Barkley's entry by his abandonment (proved by Donovan, incidentally to a contest including the other 80), and by its consequent cancellation.

We venture to urge, that neither the Land Department nor the Courts should disturb an adjustment made in accordance with a uniform construction which prevailed *at the time*. Such construction by the officers of the government entrusted with the execution of the law, through a long course of years, should be, and (as already mentioned) has been pronounced as conclusive as a judicial decision.

Various other applications of this principle may be found in

Hahn v. *U. S.*, 107 U. S., 402;
Brown v. *U. S.*, 113 U. S., 568;
U. S. v. *Philbrick*, 120 U. S., 52.

But it is urged that the certification was absolutely *void*, and conveyed no title whatever.

And to this proposition we were in the Court of Appeals and are again here cited quite at length to the decision of that Court in *Burr* v. *Greeley*, 52 Fed. Rep., 926, a case decided upon demurrer to a complaint which alleged a certain patent to be void (an allegation which the demurrer could not dispute), and concerning which the same Court of Appeals in *U. S.* v. *W. & St. P. R. Co.*, 67 Fed., 948, after allusion to erroneous certifications, and citations of this Burr case, said (p. 954):

"But was the decision and judgment of these officers

"void or only voidable? Counsel for the government "insist with great earnestness that the cases just cited "conclusively answer this question and preclude fur- "ther discussion. A careful examination of the opin- "ions, however, has led us to the conclusion that these "cases are not decisive of, and that they are hardly per- "suasive upon, this question. A determination of it "was not necessary to the decision of *either* of the "cases, so that *whatever was said concerning it was* "*obiter dicta.* In *Railway Co.* v. *Dunmeyer* no certifi- "cate or patent had issued to the railroad company, "but a patent had issued to an adverse claimant of "the land. The action was for the breach of a cove- "nant in a deed made by the grantee of the railroad "company, and it was sustained on the ground that the "railroad company never had any title, and the pat- "entee had. In *Burr* v. *Greeley,* a remote grantee un- "der the railroad company, who was in possession of "the land, claiming from the United States the rights "of a *bone fide* purchaser under the act of 1887, "brought an action against his grantor for breach of "covenant, on the ground that the railroad company "never had any title, because pre-emption rights had "attached to the land at the time of the definite loca- "tion of the line of the railroad. This court held "that the plaintiff could not maintain his action *be-* "*cause* he could not *retain the benefits* given to him as "a *bona fide* purchaser from the railroad company or "its grantee, under the act of 1887, and *at the same* "*time* recover for a breach of the covenant in his deed. "In this case patents or patent certificates had been "issued to the state for the railroad company, and it

"is stated in the opinion that these patents were void, "and that purchasers under them acquired no title. "But it is obvious that the decision must have been the "same whether the patents were void or voidable. "*That question was not material to the decision, and* "*what was said upon it was unnecessary to the deter-* "*mination of the case.* * * * The question now "before us was neither argued, considered, nor de- "cided in that case, and we enter upon its considera- "tion in this case for the first time.

"The question is, *were the certificates* of the officers "of the land department *absolutely void*, so that they "conveyed no title, legal or equitable, and so that they "were constantly open to collateral attack?"

On page 960, said Court of Appeals further said of the action of the certifying officers:

"It now appears that they were mistaken as to the "legal effects of these facts, but the question they de- "cided was one which the acts of Congress authorized "and required them to decide—one which they were "obliged to decide before they issued the certificates; "and, although their decision and the conveyances evi- "denced by these certificates may be voidable, *they* "*are not absolutely void.* They are impregnable to "collateral attack, and *they conveyed* the legal title to "the lands to the state and its grantees."

From the foregoing repudiation of *Burr* v. *Greeley* on the point under consideration, Judge Caldwell did not dissent.

Because the tract here in suit was not within the place limits, but was only within indemnity limits, it was *not* excepted from the grant."

The efficacy of certification as well as of a patent to pass legal title, *even in cases where there may be a clear right of cancellation*, was allowed by Justice Brewer in *Ard* v. *Brandon*, 156 U. S., at page 540, where he says, that the "*certification* of the one tract "and the patent of the other operated to *transfer the* "*legal title* to these *two* tracts to the railway com- "pany." At page 538 it appears that both tracts were of *indemnity* lands.

And in the *Winona & St. Peter case*, 165 U. S., 463, (on appeal of the case first cited from 67 Fed.,) and involving land in place limits which had been subject to settlers' entries at the time of definite location (p. 464, middle), and which were therefore *absolutely excepted from the grant*, it was admitted by the Solicitor General (p. 470) that "the legal effect of that certification "was, *as this court has determined, to convey them* "(the lands certified) for the use and benefit of the "Winona Company."

In the same case (p. 477, below middle), the Supreme Court speaks of the efficacy of the act of 1896 "to con- "firm the title which in this case *passed by certifica-* "*tion* to the state."

This last certification was doubtless made under Section 3 of the act of July 13, 1866 (14 Stat., 97), in terms peremptorily applicable to all Minnesota railroad land grants theretofore made; and that the office of such certification *intended by Congress* was to pass title and not merely to inform, is obvious from the ensuing words of the same sentence, that the certified lands "*shall be disposed of by said state, etc.*"

Because lands certainly *excepted from grant* were

involved in the case and decision last mentioned, the inexorable effect of its holding, as to passage of title, is to overrule by necessary implication, whatever previous decision had held not voidable, but "*void*" a patent or certification of land so excepted.

From Appellant's contention, thus inapplicable, as well as erroneous, its counsel has heretofore attempted to deduce the corollary that none of the defendants *can be* a *bona fide* purchaser, because they (meaning, probably, the respective grantors of the respective defendant purchasers), "*never acquired "any title to it.*"

The occult philosophy of this corollary manifestly is that, because the certification *is alleged* to have been, not voidable, but void, no title ever passed from the United States, and, therefore, no grantor assuming to convey had any actual title which his grantee could take.

Such reasoning may under different circumstances, be occasionally true. But a grantor who *has had* title and has conveyed it by a deed not seasonably recorded, who therefore has no actual title left, may, as we familiarly know, nevertheless give perfect title to a later purchaser without knowledge or notice of the earlier conveyance. This effect of our state statute is nothing but an equitable principle, and equity, *as* equity, or instinctive justice, itself exacted and gave birth to the statute.

This effect is permitted, because, by non-record of the earlier deed, the first purchaser has enabled the grantor to *appear* still to have the title. The innocent purchaser gets title from a grantor who actually

had none, but did have a color of title *not yet washed out*.

But the certification was not "void;" it passed the government title, and each successive purchaser of the tract in suit was equitably and legally a purchaser in good faith, because, according to all public records of the land department, of the courts and of the register's office of Faribault County, his own grantor had a regular, clear and complete title, traceable from the United States to the date of his own purchase and *he had no notice to the contrary*.

And the one only secret defect, if any, of title, was owing partly to positive misconduct of Bullis, partly to long established mistaken practice of other and higher officers of the United States, in nowise brought to the notice of any purchaser before his own investment in this land.

A word more under this head. Appellant's briefs hitherto, for some artfully dramatic purpose, have industriously used the expression "excepted from the "grant" *indiscriminately*, both as to place lands and as to indemnity lands, and have insisted that land to which a settler has *laid* claim, whether of record or not of record, *wholly* escapes the *jurisdiction of the Secretary. But to what other jurisdiction does it make its way?* What other officer or Department is thereafter to administer upon it and convey or evidence the title?

Law and good sense are satisfied by holding that after a settler's claim, or any other claim, has attached, the Secretary must so far respect the claim

as valid, as to do nothing to its prejudice; it is for him in the first instance, in case of doubt or dispute, to *pass upon its validity.* It is within his power, and is his duty, to pass upon a claim of a *railroad* company, and whenever the case, in his judgment requires issuance of a conveyance, or of other evidence of *railroad* title, to *issue* such conveyance or evidence; as, for want of any record or other notice of any opposing claim, he did in this instance.

VIII.

WOODWICK'S GOOD FAITH.

Under head of the "Third Error complained of," it was contended below that Woodwick was not a purchaser in good faith, because, as strangely alleged, Donovan was *in possession when Erichsrud got his deed from the Railway Company.* That deed was dated March 20, 1888. The judgment in *Donovan* v. *Thompson* was dated January 4, 1888 (Record 185, 6), and Donovan himself (Record 164) being asked the question, "After the termination of that lawsuit you never went upon that land after that, did you," answered only, "Yes, sir; I went on it to open the "ditch and keep it open;" and to the further question, "*Who* was in possession of the land *then,*" re- "plies *Mr. Thompson was in possession of the land "then.*"

Judge Lochren in his opinion (Record 205) says:

"The serious question is whether the *present holder* "of the title from the railroad company is a *bona fide*

"purchaser, or whether any of his grantors were "such."

Substituting for "*bona fide* purchaser", the "pur- "chaser in good faith," defined and protected by the decision of this Court, it appears to us that this question must be decided in favor of O. C. Erichsrud, his survivors and Woodwick, and that the United States, and with them Donovan, must *therefore* fail in this suit.

It was contended below, that while the matter is immaterial, the omission to file a notice of *lis pendens* in Faribault County before Woodwick's purchase, does not tend to his protection, and that the Minnesota statute relating to the record of such notice does not apply to cases in a Federal court; and in support of the first claim was cited an extract from *Union Trust Company* v. *Southern Navigation Co.*, 130 U. S., 565.

Any citation from that case is inapplicable to our facts. That case shows that one Vose had commenced an action against the Southern Inland Navigation & Improvement Co. and the Trustees of the Internal Improvement Fund of the State of Florida, in order to annul all agreements between those defendants, and to restore to the Internal Improvement Fund all lands conveyed or contracted to be conveyed to the Southern Company. The Southern Company *had* claimed that, except by the *inclusion* of its *name*, it had *never been made a party* to the Vose suit, *because* never served with process. A hearing was had upon this point, and it was decided that the Southern Company *had been served*, and from this decision that

Company took no appeal. Before decree in the Vose suit, the Trustees of the Improvement Fund nevertheless conveyed to the Southern Company; and in the case cited, on page 570, it is declared that the decree of dismissal below "must be affirmed *upon the "ground* that the deed of February 10, 1871, by the "Trustees, etc., to the Southern, &c., Company—un-"der which deed the present plaintiff as mortgagee "of the grantee claims title—was *made in violation "of the injunction* previously issued and served upon "said Trustees in the suit instituted by Vose. * * * "The injunction bound the Trustees, and they and "*all other parties to the suit* WHO WERE BEFORE THE "COURT were concluded by the decree subsequently "rendered", etc.

In support of the general proposition, this case refers to *Murray* v. *Ballou*, 1 Johns. Ch., 566, 567, in which Chancellor Kent laid it down as an established rule, that a *lis pendens duly prosecuted* and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree.

This present suit was begun March 6, 1893, *was not "duly prosecuted"*, but was through successive U. S. attorneyships for Minnesota, pigeon-holed and ignored by the Government *for about eight years*, until the employment of Mr. Gilman as Special Counsel. O. C. Erichsrud was *named* as a defendant, *but never served, he having died some years before.* His widow and heirs, and Woodwick, their grantee, were made additional defendants by supplemental bill filed March 4, 1901. No notice of *lis pendens* having been filed in Faribault County, *the* OMISSION TO FILE IT *was as-*

signed as one reason for asking leave to file the Supplemental Bill.

Before the filing of the Original Bill, O. C. Erichsrud's estate had been administered and assigned to his widow and daughters, and they, *before the filing of the Supplemental Bill,* had conveyed to Woodwick. WOODWICK DID NOT PURCHASE FROM ANY PARTY TO THE SUIT.

While we acknowledge the ancient rule that a purchaser *pendente lite* from a party to a suit was usually held bound by the decree, we find the Lord Chancellor saying, in *Sorrell* v. *Carpenter,* 2 Peere Williams, 482, that "where there is a real and *fair* purchaser, "*without any notice,* it is a very hard case, especially "in a court of equity, to set such purchase aside." He said also, "It was a difficult matter to search the "bills in equity or to be able to get notice of them, "many of such being after filing kept in the Six "Clerks' desk, and though this court will oblige all "to take notice of its *decrees* as much as of judg-"ments, yet there *does not seem to be the same reason* "for obliging people to take notice of *the filing of a* "*bill.*"

Could the Lord Chancellor have more aptly described the Government's injurious concealment of the pendency of this case, at first in the Second Division of our District where it began, and afterwards, until service of the supplemental subpoena (Record, 11), nearly 100 miles further away, in the Third Division?

But further: "*Cessante ratione, Cessat lex.*" A

rule founded upon a *public policy of necessity*, in the absence of any law providing for special record notice of the pendency of a suit concerning land, should have no place, no effect in any court held in Minnesota or in relation to real property in Minnesota, or in any other state where a statute providing for record notice among land titles has been long in force.

Since 1869 the law of Minnesota has provided as follows: (Sec. 5866, Minn. Stats. of 1894.)

"In all actions heretofore or hereafter commenced "in which the title to or any lien upon or interest "in real property shall be affected, involved or "brought in question by either party, any party to "such action may at the commencement or at any time "during the pendency thereof file for record in the "office of the register of deeds of each county in which "the real property so affected, involved or brought "in question, or some part thereof, is situated, a no- "tice of the pendency of the action, containing the "names of the parties, the object of the action, and "the description of the real property, in the county "affected, involved or brought in question thereby. "* * * and the register of deeds shall record all "such notices in the same book and in the same man- "ner as mortgages are recorded. *From the time of "filing such notice, and from such time only*, the pend- "ency of the action shall be notice to purchasers and "incumbrancers of the rights and equities of the party "filing such notice, to the real property in such no- "tice described."

And as concerning the filing of such notice by plaintiffs, such, with insignificant verbal changes, has been

the law of Minnesota since 1861; and under it the State Supreme Court, in 1878, in *Jorgenson* v. *M. & St. L. Ry. Co.*, 25 Minn., 206, held, that *since the passage of this provision* one purchasing real estate in litigation from one of the parties thereto *pendite lite, is not chargeable* with notice of the proceedings or bound by the judgment, *unless* notice of *lis pendens* was filed *as provided by such statute.*

The Federal courts take judicial notice of the General Laws of States, and administer and enforce them if not in conflict with National Constitution or Acts of Congress; and thus especially in relation to *land titles.*

If a state court *construction* of a state statute affecting real property is such an important rule of property, that the Federal courts will conform to such construction, even if in their judgment wrong, *because* a different construction would unsettle titles, equally, if not much more, should a State statute whose efficacy to set aside the ancient rule has been for twenty-four years upheld by the State court, be also respected and applied by the Federal courts as an imperative rule of property which the latter will not violate.

We therefore insist that the United States itself, as complainant in this suit, was at its commencement, and *until after* Woodwick's purchase continued to be, guilty of such laches as alone ought to preclude its recovery of this land from Woodwick. And this, upon the further ground, *demonstrated by the evidence*, that there is not the slightest reason to suspect that any Erichsrud, or Woodwick, ever heard

of this suit, or of any question concerning their respective titles, until, after Woodwick's purchase, the Supplemental Subpoena was served upon them respectively.

Counsel contended below that under what was then termed an "abstract" (to be found at p. 188 of the Record) Woodwick had *no record evidence* of title, and *therefore* could not claim to be a *bona fide* purchaser.

It must be remembered that under the *W. & St. P.* case he need be no more than such "a purchaser in good faith" as there defined.

But why do counsel affect to ignore the real abstract, "Defendant's Exhibit 3," beginning on page 173 of the Record, and identified by Woodwick as *the* abstract under which he purchased. (Record 153.) Of this abstract, Item 2 is the List certified by the State Auditor, and made evidence of title by Chapter 97 of Minnesota Laws of 1875, now Sections 4199-4202 of the Statutes of 1894; this goes to show the title *out of* the United States; without enumerating intervening items, Item 22 shows the Railway deed to O. C. Erichsrud, recorded June 8, 1888, and Item 23, the Final Decree of the Probate Court assigning the Erichsrud estate which was recorded on the same day as the deed to Woodwick, and was doubtless shown to him as well as recorded, and added to the abstract, in connection with his purchase.

In view of the course of judicial decision under the act of 1887, supplemented and limited by the additional precautions of the more liberal and more protective act of 1896, it seems almost superflous to argue

against any unsupported assertion of counsel, that the act of 1887 applies only to land *still* a part of the public domain—because if title to our tract "passed "by certification" as held in the *W. & St. P.* case, *it thereafter was no longer* a part of the public domain, and nothing but a revesting decree could restore it. Both acts plainly assume government *losses of title,* and provide for reclamation and recovery of titles or compensation for titles which have mistakenly *passed out of* the United States.

It has been the error of Government officers charged with the administration of these designedly beneficent acts, and of Counsel for Appellant, that they have mistaken the meaning of the terms "adjust" and "adjustment"; mistaken the *purpose* of each act —which was to accomplish *justice,* to "do the fair thing" under the circumstances of each case; to relieve, by confirmation or compensation, consequences of innocent mistake; mistakes solely of Government officers, which, without provision for relief, must result in hardship to investors no less innocent, no less meritorious than settlers, real or bogus.

Although in *U. S.* v. *So. Pac. R. Co.,* 184 U. S., 49, this Court at page 52, appreciatively declared that "These acts were passed *for the purpose* of upholding "ing the titles of parties who in good faith had pur- "chased from railroad companies lands which though "supposed to be part of their grants, proved not to "be so," these gentlemen assume that the chief object of these laws was to invite guerilla attack, to continue and bring to a finish the *pillage* of railroad grants, and to beggar investing citizens who have put their trust

and their funds into them and into supposed Government reliability.

IX.

COMPETENCY TO SUE. LACHES AND LIMITATIONS.

Appellant's "Fifth" and "Sixth" Assignments respectively relate to the competency of the United States to sue, and to the applicability to the United States of the doctrine of *laches* and of the Statute of Limitations.

If by the assertion that the United States can "*maintain*" this action is meant that the United States is, in a proper case a *competent person to become* a Complainant, and in that character to institute and bring to trial an equity suit for the cancellation of an erroneous certification or patent, we would not forbear admission of thus much without argument or citation.

But as to the alleged right of the United States successfully to maintain *this* action to a decree in its favor, or in Donovan's favor, or its right in *this* case to avoid the application of the statute of limitations or of the doctrine of *laches*, we respectfully dissent.

In a *W. & St. P.* case in 67 Fed., at page 972, we find the following enunciation of our Circuit Court of Appeals:

"Nor is it denied that 'when the government is a "mere formal complainant in a suit, not for the pur-"pose of asserting any public right or protecting any "public interest, title or property, but merely to *form* "*a conduit* through which *one private person can con-*

"*duct litigation against another private person*, a "court of equity *will not be restrained* from adminis- "tering the equities existing between the *real parties* "by an exemption of the government designed for "the protection of the rights of the United States "alone.' *U. S.* v. *Beebe*, 127 U. S., 338, 347; 8 Sup. "Ct., 1083; *Curtner* v. *U. S.*, 149 U. S., 662, 674; 13 "Sup. Ct., 985, 1041."

In *Curtner* v. *U. S.*, 149 U. S., 662, holding that in a suit brought for the benefit of private persons, where the Government is not interested in the result, the United States will be barred if the beneficiary would be barred, this Court, on page 674, (quoting and following *U. S.* v. *Beebe*, 127 U. S., 338), says, among other things, "the mere use of its name in a suit for "the benefit of a private suitor cannot extend its im- "munity as a sovereign government to said private "suitor, whereby he can avoid and escape the scrutiny "of a Court of Equity * * * nor stop the Court "from examining into and deciding the case accord- "ing to the principles governing Courts of equity in "like cases, between private litigants."

What can be more evident from the Bill itself, than that this suit is prosecuted *solely* for the benefit of Donovan, and that the United States *is* designed to be nothing but a "conduit" through which Donovan can conduct litigation at public expense, against other private persons?

In the sentence following the above quotation, our Circuit Court of Appeals added:

"But the United States sustains no such relation to "*this* suit."

On the contrary, defendant Donovan has here appeared and answered by Special Counsel for the United States, of course admitting the Bill, with picturesque and sweet resignation, though, as against him and without prejudice to him, the Bill might as well have gone *pro confesso;* and he thus appears and answers, by grace of the Appellant and its Special Counsel, *without leave of Court* or notice to Co-defendants, *several years after his right to answer had expired.* If this is not enough to demonstrate Donovan's interest as the sole motive of the suit, the department correspondence in the Record (120-128) and the whole course of previous Briefs of counsel for Appellant make the demonstration not only elaborate but conclusive.

And in this consists another difference of our case from the *Marshall* case; for the Circuit Court of Appeals there says (on page 972):

"The *only* evidence *tending* to show that this suit "is instigated by Marshall is the fact that he filed a "petition," etc.

Another difference: In Marshall's case it was said (on page 972): "The United States is *not without interest* in this suit."

Why? Because Marshall, being a pre-emptor, the United States, if successful, would receive from him at least $1.25 per acre.

Not so as to Donovan as Homesteader. If successful now, the United States can get from him no more than $5.00 under Section 2290, and $1.00 under Section 2238, not only for the land, but for its expenses

of suit—while it has been zealously claimed for Donovan that he paid these very driblets nearly thirty-four years ago, and will hereafter owe *nothing of price.*

In the Marshall case the Circuit Court of Appeals *did not* declare the *general* exemption of the United States "from the statute of limitations and from *laches*, but its exemption *in this case.*" (p. 972, at foot.)

This Court will not fail to discern the dissimilarity of Marshall's entry, situation, conduct and resulting rights to what is, in these particulars, claimed for Donovan under other contentions of the Appellant.

Marshall filed a pre-emption *before* the Definite Location, and his tract was originally and absolutely "*excepted from the grant.*"

In *U. S.* v. *San Jacinto Tin Co.*, 125 U. S., 273, 284 (cited by Appellant under the propositions now considered), the great Justice Miller, speaking, not in dissent, but as the organ of the unanimous Court said:

"*If* the doctrine that the United States in bringing "such actions is not controlled by any statute of limi- "tations, or governed by the rule concerning *laches*, "be sound * * * then the evil which may result "would seem to be endless as well as enormous."

So might Woodwick well think if his title is here made to fail.

But this protest in the San Jacinto case, was but a prelude, a *signal;* for in *U. S.* v. *Des Moines, &c. Co.*, 142 U. S., 510, at p. 538, it was further held, that

"Where the United States is only a formal party, "and the suit is brought in its name to enforce the

"rights of individuals, and no interest of the govern-
"ment is involved, the defense of laches and limita-
"tion will be sustained as though the government was
"out of the case, and the litigation was carried on in
"name, as in fact, for the benefit of private parties";
and in

U. S. v. *Bell Teleph. Co.*, 167 U. S., 240, *265*, it was said:

"But when it (the U. S.) has no proprietary or
"pecuniary result in the setting aside of the patent;
"is not seeking to discharge its obligations to the
"public; when it has brought the suit simply to help
"an individual; making itself, as it were, the instru-
"ment by which the right of that individual against
"the patentee can be established, then it becomes sub-
"ject to the rules governing like suits between pri-
"vate litigants."

And this contention is distinctly and abundantly sustained, and any contrary contention exploded by *Moran* v. *Horsky*, 178 U. S., 205, in which at page 213, the Court, without a dissent, said:

"But it is well settled, that when the *government*
"proceeds to set aside its patent, *not* for the sake of
"establishing its own right to the property, *but in the*
"*interest of some person who has an equitable claim*
"*thereto, or to whom the government owes the duty*
"*of protecting his interests, it is subject to the same*
"*defenses of laches, limitation and want of equity* that
"would attach to a like suit by an individual."

And on page 214, it was further said:

"Now, if the government, seeking, *in order to dis-*
"*charge its duty to the defendant*, to avoid so much

"of the patent as included this mining claim, is bound "by the *ordinary rules of equity in respect to laches, "etc., a fortiori* is it true that when he is the party "to the litigation the same equitable rules are bind- "ing on him. The government cannot, *when acting "for him,* avail itself of those principles of law which "are designed *simply for its own protection,* and no "more can he, in his own litigation, shelter himself "behind those principles. It is a private right which "he is relying upon, although a right created under "the laws of the United States, and as to this private "right he is subjected to the ordinary rules in re- "spect to the enforcement and protection of such a "right."

Let it be here observed that the Government was not a party in *Moran* v. *Horsky.* By the passages quoted therefrom, the Court but illustrated the infirmity of the case of the complainant by like weakness of a like case prosecuted for him by the Government—he, privately prosecuting, could not win, *because* the Government prosecuting for him, would be barred by laches, limitations or want of equity. In our case, it is nevertheless contended that Donovan's claims, irrecoverably gone, if prosecuted by him in his own name, are saved and invincibly assured to him, *because* the Government is prosecuting for his sake.

But if our quotations from *Moran* v. *Horsky* be law applicable to the case at bar, a vital question for decision is whether laches, limitations or want of equity would debar Donovan if himself complainant.

But this prosecution further seeks respectability of

morals under screen of the alleged parental "duty" of the United States to Donovan. No misnamed duty to Donovan can require the Sovereign to *perpetrate a gross wrong*, to install Donovan in an ownership which, subjected to the doctrine of laches and to the bar of statutes of limitations, he could not himself successfully assert. *There can be no Sovereign duty to* ROB *Peter in order to pay Paul.*

Notwithstanding any inventable semblance of duty, the United States, prosecuting solely in the interest of Donovan, should be held estopped and barred by whatever doctrine or statute would estop and bar him in his own private suit.

Besides the fifteen-year Minnesota statute in restraint of Ejectment, at least one other Minnesota statute of limitations, in force as far back as 1866, long ago ran against a cause of action which Donovan, when in actual possession, might have asserted against either Southern Minnesota Company, if not also against the Erichsrud survivors; *an action to determine adverse claims*, or to quiet title.

But quite aside from, in addition to, whatever in any party other than the United States would inevitably be adjudged gross laches, Donovan himself has been throughout guilty of such varied laches and waivers of claim as should in equity preclude recovery either by him or by the United States in his behalf.

What has Donovan so done or omitted, the doing or omission of which may well be presumed to have misled Erichsrud, his surviving widow and daughters, and Woodwick; and down to March 20, 1888, the Southern Minnesota Railway Company?

1. He easily consented to change of his application to enter;

2. He did not pay the $5 or the $1 payable on homestead entry of the tract in suit;

3. He did not appeal from the rejection of his application to enter, considered as not waived;

4. He made his actual residence upon the 80 entered, not upon the 80 in dispute.

5. He did not appeal from the rejection of his offer to prove up in 1875;

6. He omitted to bring suit to determine adverse claims, or quiet title, against the Southern Minnesota Railroad Company before its foreclosure; or against the Southern Minnesota Railway Company before its deed to Erichsrud;

7. He attempted independent entry of this 80 as an "adjoining farm homestead" in June, 1883;

8. When Thompson came on and ordered Donovan off, he *went* off, surrendering the cultivated portion, though his cattle continued to nibble pasture over the unfenced residue; he was not "forcibly excluded";

9. He did not appeal from the judgment of the state court rendered in January, 1888, in the suit *brought by himself* in 1885; *he accepted the decision of a tribunal of his own choice;* and *in that case, the fact,* and *the validity of the certification of this land* were put in issue *by Donovan's reply* to Thompson's answer;

10. His attempt to purchase from Mrs. Erichsrud at $19 per acre, three-fourths of the value to which he swears some years later:

(Here observe Donovan's method. At page 161 of the Record he makes it seem that Mrs. Erichsrud *opened* the correspondence proposing sale, and that he *only answered.*

Mrs. Erichsrud's testimony (Record 166), discloses two letters *from Donovan*—one, if not both, seeking to purchase; to which she replied by her one letter; and not content with correspondence, Donovan visited her for the same purpose.

This was a negotiation between a crafty man and a widow of usual ignorance concerning business.)

11. Donovan never paid a tax upon this land, does not appear to have assumed any burden or expense of ownership, though complacently willing to take all products of the land obtainable without resistance, as well as to co-operate heartily with the government in a litigation for his benefit, *which costs him nothing.*

In contrast with all these evidences of indifference, waiver, abandonment, we see, in the course of twenty years or more, one or two spasmodic assertions of interest, *concealed* (except his suit against Thompson), from public observation; severally inspired, perhaps by an adventurous attorney in search of fame or fee, perhaps by Donovan's chance to enlist a congressman of fame (John Lind) to serve without fee.

In a private suit of Donovan against Woodwick or against Erichsrud or against his surviving family, ought not, must not, the necessary effect of all this misleading conduct of Donovan be adjudged laches and preclude his recovery, as *inequitable?*

If so, should the United States, suing in place of

Donovan, and for his benefit, be permitted to ignore or override equities in favor of those defendants, which they could successfully oppose to his personal suit?

Is this a case in which the United States shall be permitted to evade limitations or laches; and this, solely because the whole foundation of Federal claim, if any, is the creation of misconduct or mistakes of its own officials?

Yet another item of laches, personal to the United States as complainant, ought of itself alone, to preclude recovery of this land from Woodwick, the one defendant (other than Donovan) now interested in the land as owner.

No *lis pendens* was filed in Faribault County to warn the Erichsrud family not to sell, or to warn Woodwick not to buy. And as heretofore noted, there is not the slightest reason to suspect that any Erichsrud, or Woodwick, ever heard of *this* suit, or unless in the record of Donovan's unsuccessful suit against Thompson, of any question concerning their respective titles, until the supplemental subpœna was served upon them respectively; and the brief of Mr. Purdy (pp. 74, 75) concedes that the mere pendency of the present suit was not constructive notice to Woodwick.

But notice of the Donovan-Thompson suit, tried, decided against Donovan plaintiff, and not appealed, was perfectly consistent with good faith in Erichsrud and in Woodwick; for this Court in *U. S.* v. *So. Pac. R. Co.*, 184 U. S., on p. 54, says: "A party *may have* "*notice* of conflicting claims, and still, in the exercise "of an honest judgment as to the rightful owner, buy

"property and pay for it, AND BE ACTING IN GOOD "FAITH."

While the maxim "*Prior in tempore, potior in jure*" is often a just maxim of equity as well as of law, it is no less true that an earlier equity, or an absolute legal right, *may lapse and cease* by reason of *subsequent conduct* of the party otherwise entitled to assert it.

As against the supplemental defendants (the Erichsrud survivors and Woodwick), this suit was brought in 1901, about thirty-three years after Donovan's attempt, close to thirty years after the certification, fourteen years after the act of 1887, thirteen years after purchase by Erichsrud. *By or for any of them*, may it not be well contended, that this claim is exceedingly "*stale*," if it ever had slightest merit?

It has been specially charged against Woodwick in one of the courts below, that "The evidence shows that "the defendant Woodwick purchased the land on specu- "lation, and never *occupied* it or expended a dollar "*upon* it; that neither he nor any party under whom "he claims ever erected *any building* upon the land or "expended any *money in its improvement*, except "plowing it up for crops."

What more did Donovan ever do? Donovan ploughed 18 to 20 acres in all—now, cultivation has extended to sixty-five acres,—to all except the wet portion of the land.

Woodwick paid full value, $25 cash per acre; Donovan's own valuation (Record 72). As to Woodwick's

good faith, and desert of confirmation in his title, it makes no conceivable difference whether he bought for his own occupancy as a farmer, or to rent to other farmers, or for an investment to await further rise in value.

We respectfully and without diffidence submit, that any supposed duty or tenderness of our government to deserving citizens will be best performed and most appropriately manifested, not by depriving Woodwick of land in which he has unsuspectingly invested $2,000, full value, upon the faith of every public record, and without slightest previous suggestion of any infirmity of title, but *by confirming his title;* and that both Courts below should be affirmed.

The "Seventh" alleged error of the Trial Court, being but a résumé of and inference from preceding assignments, requires no separate treatment, unless possibly this suggestion: The supposed conclusion of the Circuit Court, Lochren, J., "that Donovan made "a legal application to enter the land and paid for "the same," is not binding upon this court, cannot preclude this final Court from its own conclusion. We have presented our views against the *legality* of Donovan's application and against the *truth* of his pretences of payment. The remarks of a Trial Judge, in an oral opinion delivered immediately after argument, have not the force of the Verdict of a Jury, or of "findings of fact" by a Court sitting without Jury. They need not have been made, reported or filed, and in strictness they form no part of the record. The

whole evidence is now before this Court in the record, the appeal is general and from the decree, and the whole case is here for consideration *de novo*.

BURTON HANSON and
W. H. NORRIS,
Solicitors for Railway Companies, Appellees.

APPENDIX.

MINNESOTA STATUTES.

ACTIONS CONCERNING REAL PROPERTY.

Sec. 5134, Statutes of 1894 (a compilation):

"No action for the recovery of *real property* or for "the recovery of the possession thereof, shall be main- "tained unless it appears that the plaintiff, his ances- "tor, predecessor, or grantor was seized or possessed "of the premises in question within fifteen years be- "fore the commencement of the action."

Before Chapter 91 of 1889 (April 24, 1889), the corresponding provision was Section 4 of Chapter 66 of the General Statutes of 1866 (a revision), making *twenty* years the period of limitation.

The Act of 1889 only reduced the former "twenty" year period to the present "fifteen."

Sec. 5817 of said Statutes of 1894, gives an "*action to "determine adverse claims,*" as follows:

"An action may be brought by any person in *pos- "session*, by himself or his tenant, of real property, "against any person who claims an estate or interest "therein *or lien upon the same*, adverse to him, for "the purpose of determining such adverse claim, es- "tate, *lien* or interest; *and any person having or claim- "ing title to vacant or unoccupied real estate may "bring an action against any person claiming an es- "tate or interest therein adverse to him, for the pur-*

"*pose of determining such adverse claim, and the "rights of the parties respectively.*"

Of the last above, the first clause, except its italicised words as to *lien*, was Sec. 1 of Chap. 75 of the General Statutes of 1866 (a revision).

Chap. 68 of 1874 (Mch. 9, 1874) amended by adding the second clause (italicised) and inserting the italicised words of the first clause below the first line.